No. 43967-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN ALLEN LISCHKA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Jonathan Lischka was charged in one information with misdemeanor harassment and possession of methamphetamine and later, in a separate information, with third degree malicious mischief based on an incident that occurred two weeks later. Prior to trial, the deputy prosecutor moved to join all three offenses and consolidate them in a single trial. But each of the charges was based on acts occurring at different times and places against different victims. They were not part of a single scheme or plan and evidence of each count would not have been admissible in separate trials on the other counts. Therefore, Mr. Lischka was unfairly prejudiced by the court's decision to allow the jury to consider all of the charges in a single proceeding.

B. ASSIGNMENTS OF ERROR

1. Mr. Lischka was unfairly prejudiced by the trial court's decision to consolidate the three charges for trial in a single proceeding.

2. To the extent counsel waived Mr. Lischka's right to object to consolidation by not timely moving to sever, Mr. Lischka received ineffective assistance of counsel.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In determining whether a trial court's decision to consolidate multiple charges unfairly prejudiced the accused, the reviewing court considers: (1) the strength of the State's evidence on each count, (2) the clarity of defenses as to each count, (3) court instructions to the jury to consider each count separately, and (4) the admissibility of evidence of the charges even if not joined for trial. If the State's evidence on any count is weak and evidence on each count would not have been admissible at separate trials, the denial of severance is unfairly prejudicial. Was Mr. Lischka unfairly prejudiced by the court's decision to consolidate the three charges, where the State's evidence on two of the charges was relatively weak and the evidence on each count would not have been admissible at separate trials?

2. An attorney may waive a defendant's right to object to consolidation by not making a timely motion to sever. If there is no reasonable tactical basis for failing to make a timely motion and the defendant is prejudiced as a result, the defendant has received ineffective assistance of counsel. Did Mr. Lischka receive ineffective assistance of counsel where his attorney did not renew her objection to

consolidation at the close of the State's evidence, and Mr. Lischka was unfairly prejudiced by the consolidated trial?

D. STATEMENT OF THE CASE

Mr. Lischka and Sara Henke were in a romantic relationship for about five years. 7/31/12RP 103. They broke up in the beginning of 2012. Id. During the following weeks, Mr. Lischka became increasingly agitated and frustrated about the breakup. 7/31/12RP 33-34. According to his friend Rodney Teitzel, he "seemed to get progressively worse at a rate that alarmed [Mr. Teitzel]." 7/31/12RP 35. He began talking about "conspiracy theories" and claimed that "his friends and people closest to him were trying to do him harm." Id. He directly accused Mr. Teitzel of having sexual relations with Ms. Henke. 7/31/12RP 38. Mr. Lischka told Mr. Teitzel that he thought his friends "had done him wrong" and that "he would make sure that the things were righted," but he was never specific about how he would do that. 7/31/12RP 36. He would send Mr. Teitzel many nonsensical messages but made no specific threats. 7/31/12RP 38, 50.

On March 8, 2012, Mr. Lischka contacted Mr. Teitzel a number of times by text message and telephone call. 7/31/12RP 38, 40. He said he was tired of his friends betraying him and ranted about how

unfair it was. 7/31/12RP 40. He told Mr. Teitzel, "You can come to my house tonight and be honest with me." 7/31/12RP 39. Then he asked Mr. Teitzel where he was. 7/31/12RP 40. Mr. Teitzel thought Mr. Lischka might be trying to find him and became worried. Id. According to Mr. Teitzel, Mr. Lischka asked "if I was on his side or against him, was I in or out, was I going to help him or not help him in getting to the bottom of the situation he believed he was in." 7/31/12RP 41. When Mr. Teitzel responded that he was "out" and not interested, Mr. Lischka yelled and screamed, said, "It's on" and "We're going to settle this," said he was coming to Mr. Teitzel's house right now, then hung up. 7/31/12RP 42, 46.

Although Mr. Lischka made no specific threats, Mr. Teitzel felt threatened and thought Mr. Lischka might possibly harm himself or others. 7/31/12RP 42. He called police. 7/31/12RP 46.

Lewis County Sheriff Sergeant Robert Snaza was in his car on the side of the road talking to Mr. Teitzel on the phone when he saw Mr. Lischka drive by. 7/31/12RP 65-66. He pulled Mr. Lischka over and arrested him for harassment of Mr. Teitzel. 7/31/12RP 66, 68. Sergeant Snaza conducted a pat-down search of Mr. Lischka and found a crystal substance in the watch pocket of his pants. 7/31/12RP 71.

Mr. Lischka said the substance was his and was only for his personal use. 7/31/12RP 75. He told Sergeant Snaza that he had recently broken up with his girlfriend and was very upset about it. 7/31/12RP 76. The substance was later tested and determined to be methamphetamine. 7/31/12RP 96.

The next day, the State charged Mr. Lischka with one count of possession of methamphetamine and one count of misdemeanor harassment of Mr. Teitzel. CP 1-2.

Two weeks later, on March 22, Ms. Henke went to Mr. Lischka's house in Centralia. 7/31/12RP 104. She drove there in her Chevrolet Cavalier. 7/31/12RP 105. Ms. Henke and Mr. Lischka had been talking about their relationship and whether they should get back together; they both wanted to reconcile. 7/31/12RP 104. At one point, while Ms. Henke was standing next to her car, Mr. Lischka took a weight from a weight bench and tossed it at the windshield of her car, breaking the windshield. 7/31/12RP 106. Mr. Lischka was not yelling and Ms. Henke was not afraid or intimidated by his behavior. 7/31/12RP 115. Nonetheless, she called police because she wanted him to have to pay for the damage. 7/31/12RP 108.

The next day, the State charged Mr. Lischka in a separate information with third degree malicious mischief.[1] CP 54-55.

The State moved to join all three charges and consolidate them for trial in a single proceeding. Over defense objection, the court granted the motion. 5/10/12RP 5-7. The court found "[a]ll of the Defendant's alleged actions in the above captioned cause numbers were the result of one continuing course of conduct related to the Defendant's frustration and disagreement over his relationship, or lack thereof, with his ex-girlfriend Sara Henke."[2] CP 10. The court further found, "[t]he alleged facts in these cases are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CP 10.

On July 31, 2012, the first day of trial, counsel again objected to consolidation, which the court overruled. 7/31/12RP 6.

The jury found Mr. Lischka guilty as charged of possession of methamphetamine and third degree malicious mischief. CP 39, 72, 74. The jury acquitted Mr. Lischka of harassment. CP 40.

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[1] The State also charged Mr. Lischka with intimidating a witness but that charge was later dropped. CP 54-55, 68-69.

[2] A copy of the court's written findings and conclusions regarding the State's motion for joinder is attached as an appendix.

D. ARGUMENT

MR. LISCHKA WAS UNFAIRLY PREJUDICED BY THE TRIAL COURT'S DECISION TO CONSOLIDATE ALL THREE CHARGES FOR TRIAL IN A SINGLE PROCEEDING

Two or more offenses may be joined in one charging document if the offenses (1) "[a]re of the same or similar character, even if not part of a single scheme or plan"; or (2) "[a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3(a). If two or more offenses are properly joined under CrR 4.3, they "shall be consolidated for trial unless the court orders severance pursuant to rule 4.4." CrR 4.3.1(a). Even if multiple offenses are not joined together in a single information, they may be consolidated for trial if they "could have been joined in a single charging document under rule 4.3." CrR 4.3.1(c).

A court may sever offenses if doing so will promote a fair determination of the defendant's guilt or innocence of each offense, considering any resulting prejudice to the accused. CrR 4.4(b); State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Consolidation of separate counts in a single trial "should never be used in such a way as to unduly embarrass or prejudice a defendant or deny him or her a substantial right." State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747

(1994). "Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition." Id. at 62-63.

On appeal, a trial court's refusal to sever charges is reviewed for abuse of discretion. Id. To determine whether a trial court should have severed charges to avoid prejudice to a defendant, the reviewing court considers (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009).

1. Application of the four-part test shows that Mr. Lischka was unfairly prejudiced by the trial court's decision to consolidate the three charges.

   a. The evidence on the possession of methamphetamine charge was much stronger than the evidence on the other two charges.

The possession of methamphetamine charge was relatively easy to prove under the facts of this case. To prove the crime, the State had only to prove that Mr. Lischka possessed the substance and that the substance was methamphetamine. See RCW 69.50.4013, .206(d)(2);

CP 24. These elements were essentially uncontested. Sergeant Snaza testified that when he arrested Mr. Lischka, he found a crystal substance in his pocket that was later determined to be methamphetamine. 7/31/12RP 71, 96. Mr. Lischka acknowledged the substance was his and that it was for his personal use. 7/31/12RP 75.

By contrast, the State's evidence on the other two charges was much weaker. During closing argument, the deputy prosecutor acknowledged that the evidence supporting the possession of methamphetamine charge was much stronger than the evidence on the other two charges, and that the evidence supporting the harassment charge in particular was "subject to debate." 8/01/12RP 157.

To prove harassment, the State was required to prove Mr. Lischka knowingly and unlawfully threatened to cause bodily injury immediately or in the future to Mr. Teitzel or to any other person, and that Mr. Teitzel reasonably feared the threat would be carried out. RCW 9A.46.020(1)(a)(i); CP 29. There was very little evidence that Mr. Lischka actually threatened Mr. Teitzel. Mr. Teitzel testified that Mr. Lischka contacted him on March 8, 2012, and was upset and yelling at times. 7/31/12RP 38, 40, 42, 46. He asked Mr. Teitzel if he was "on his side or against him," and if he would help him "get to the

bottom" of the situation he was in. 7/31/12RP 40-41. He also asked Mr. Teitzel where he was. Id. But Mr. Lischka made no specific threats. He did not threaten to cause bodily injury to Mr. Teitzel or to anyone else. The State's evidence of harassment was so weak that the jury acquitted Mr. Lischka of the charge. CP 40.

The State's evidence on the malicious mischief charge was also much weaker than its evidence of possession of methamphetamine. To prove third degree malicious mischief, the State was required to prove that Mr. Lischka "knowingly and maliciously" caused physical damage to Ms. Henke's car. RCW 9A.48.090(1)(a); CP 34. The State had to prove beyond a reasonable doubt that Mr. Lischka acted with an "evil intent, wish, or design to vex, annoy, or injure" Ms. Henke. RCW 9A.04.110(12); CP 31. But the State's evidence of Mr. Lischka's intent was equivocal. Ms. Henke testified that although Mr. Lischka tossed a weight on her windshield, he was not yelling or angry and she was not afraid or intimidated by his actions. 7/31/12RP 106, 115. She called police only because she wanted him to pay for the damage. 7/31/12RP 108. This evidence did not inevitably lead to the conclusion that Mr. Lischka acted with "malice."

If the State's evidence on any count is weak, "any prejudice flowing from the joinder would likely be significant." State v. Hernandez, 58 Wn. App. 793, 800, 794 P.2d 1327 (1990), abrogated on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Because the State's evidence of Mr. Lischka's evil intent on March 22 was equivocal, the jury was likely influenced by the evidence of his unrelated prior bad acts. Thus, this factor weighs heavily in favor of the conclusion that Mr. Lischka was unfairly prejudiced by the court's decision to consolidate the charges.

b. Mr. Lischka presented different defenses to the three charges.

Mr. Lischka did not present a defense to the possession of methamphetamine charge. Counsel did not present any evidence to rebut the State's evidence or cross-examine Sergeant Snaza or the forensic scientist about the charge. See 7/31/12RP 77-80. Counsel did not mention the charge in closing argument. See 8/01/12RP 166-72.

As for the harassment charge, the defense was that Mr. Lischka never actually threatened or assaulted Mr. Teitzel and that Mr. Teitzel did not reasonably fear bodily harm. 8/01/12RP 167-68. The defense to the malicious mischief charge was that Mr. Lischka did not act with malice but out of frustration. 8/01/12RP 171-72.

"The likelihood that joinder would cause the jury to be confused as to the accused's defenses is very small where the defense is identical on each charge." Hernandez, 58 Wn. App. at 799. In this case, the defense to each charge was *not* identical. Therefore, this factor leads to the conclusion that the jury was likely confused by the different defenses presented.

c. The court's instructions were not adequate to mitigate the prejudice resulting from consolidation.

The court provided the jury with the standard instruction: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 20. Yet the court did not provide a limiting instruction directing the jury that the evidence of one crime could not be used to decide guilt for a separate crime. See Sutherby, 165 Wn.2d at 885-86. In addition, the prosecutor encouraged the jury to use evidence of one crime as evidence of another by arguing that each crime was part of a single extended crime spree resulting from "the defendant's relationship deteriorating with his ex-girlfriend." 8/01/12RP 156.

In Sutherby, as here, the trial court instructed the jury that it must decide each count separately but did not instruct the jury that it could not use evidence of one crime to decide guilt for a separate crime. Sutherby, 165 Wn.2d at 885-86. In addition, the prosecutor encouraged the jury to use the evidence of one crime as evidence of another. Id. Thus, the Supreme Court concluded this factor weighed in favor of the conclusion that Sutherby was unfairly prejudiced by consolidation of the charges. The same conclusion applies here.

d. The evidence of each charge would not have been admissible at separate trials on the other charges.

This factor rests on the fundamental principle that "[a] defendant must be tried for the offenses charged, and evidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of mistake or accident, common scheme or plan, or identity." Sutherby, 165 Wn.2d at 887; ER 404(b).[3] The question is whether evidence of one charge would have been

[3] ER 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

admissible under one of these exceptions at separate trials on the other charges. Id.

There should be no question that evidence of Mr. Lischka's possession of methamphetamine on March 8, 2012, would not have been admissible at a separate trial on the malicious mischief charge, which allegedly occurred two weeks later. Courts widely recognize that evidence of a defendant's drug or alcohol use is highly prejudicial and may be admitted at a criminal trial only if directly relevant to a material issue. See, e.g., State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974); State v. LeFever, 102 Wn.2d 777, 785, 690 P.2d 574 (1984), overruled on other grounds by State v. Brown, 113 Wash.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989). In State v. Grove, 65 Wn.2d 525, 529, 398 P.2d 170 (1965), for instance, evidence of the defendant's addiction to alcohol was admissible to prove his motive for murdering his mother-in-law, where the State's theory was that the defendant was an alcoholic and dependent on his wife for support, and murdered the mother-in-law because she was encouraging her daughter to leave him.

Here, by contrast, evidence of Mr. Lischka's drug use was not directly relevant to prove any material issue of the malicious mischief

charge. There was no evidence that Mr. Lischka was under the influence of methamphetamine at the time of the March 22 incident or that methamphetamine played any role at all in the crime. Mr. Lischka's prior drug use was not relevant to show motive, intent, absence of mistake or accident, common scheme or plan, or identity. Admission of the evidence at a separate trial on the malicious mischief charge would probably have resulted in reversible error. See Renneberg, 83 Wn.2d at 737; LeFever, 102 Wn.2d at 785.

Likewise, evidence of the harassment charge would not have been admissible at a separate trial on the malicious mischief charge. Again, the two incidents occurred two weeks apart and involved different alleged victims. Even if they were both connected to Mr. Lischka's distress about his breakup with Ms. Henke, the evidence of Mr. Lischka's interactions with Mr. Teitzel was not relevant to prove whether he knowingly and maliciously damaged Ms. Henke's car.

The trial court found that the two incidents were "based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CP 10. But evidence of the harassment charge did not fall under the narrow "common scheme or

plan" exception to the general prohibition against propensity evidence as set forth in ER 404(b).

Evidence of misconduct may be admissible to prove a scheme or plan of which the crime charged was a part. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice §404.20, at 537 (5th ed. 2007). "Traditionally, at least, such evidence has been admissible on the theory that proof of an overarching scheme or plan (with evidence of prior misconduct) tends to prove one specific part of the plan (the crime charged). Such evidence may demonstrate motive, intent, or other relevant facts." Id.

"Common scheme or plan" is a narrow exception to the general prohibition against propensity evidence and does not apply to "acts and circumstances which are merely similar in nature." State v. Harris, 36 Wn. App. 746, 751, 677 P.2d 202 (1984). To fall under the exception, the two offenses must "qualify as links in a chain forming a common design, scheme or plan." Id. Otherwise, they "show only a propensity, proclivity, predisposition or inclination to commit" the crime, which is explicitly prohibited by ER 404(b). Id.

In State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003), for instance, the Supreme Court upheld the admission of evidence of the

defendant's prior similar "grooming" behavior conducted with different victims in a child sex offense prosecution. The evidence was relevant to prove the charged crimes because it "showed a design or plan to add a sense of normalcy to his behavior and to gain the trust of the girls." Id. at 19. Similarly, in State v. Stein, 140 Wn. App. 43, 69-70, 165 P.3d 16 (2007), the Court upheld admission of evidence that the defendant threatened to kill a judge and blow up a courthouse where the State's theory was that the prior acts as well as the charged crime were all "part of a single, overarching conspiracy to remove those Stein believed were standing in the way of his inheritance." See also State v. Pleasant, 21 Wn. App. 177, 583 P.2d 680 (1978) (evidence of murder charge would have been admissible at separate trial on manslaughter charge, where State's theory was that the defendant killed each victim as part of his overarching scheme or plan to eliminate his rival and regain the favor of his ex-wife).

Here, by contrast, there was no evidence that the harassment charge and the malicious mischief charge were part of a single overarching design, scheme or plan. There was no evidence that Mr. Lischka *had* a scheme or plan. At most, the evidence showed Mr. Lischka was in distress as a result of his breakup with Ms. Henke and

was behaving erratically as a result. But this is not enough to show that his actions were the result of a "common scheme or plan." Harris, 36 Wn. App. at 751. Therefore, evidence of the harassment charge would not have been admissible at a trial on the malicious mischief charge because it would "show only a propensity, proclivity, predisposition or inclination to commit" the crime, which is explicitly prohibited by ER 404(b). Id.

If the State's evidence on any count is weak and evidence on each count would not have been admissible at separate trials, the denial of severance amounts to an abuse of discretion. Hernandez, 58 Wn. App. at 800. Because the evidence on the harassment and malicious mischief charges was relatively weak and evidence of each charge would not have been admissible in separate trials on the other charges, the trial court abused its discretion in denying severance.

2. To the extent defense counsel waived Mr. Lischka's right to challenge the court's refusal to sever the offenses by failing to make a timely objection, Mr. Lischka received ineffective assistance of counsel.

The three charges were consolidated on the State's pretrial motion to join the two charges in the first information with the one charge in the second information. 5/10/12RP 5-7; CP 10. Counsel

objected to joinder at that time. Id. She also renewed her objection on the first day of trial. 7/31/12RP 6. Therefore, Mr. Lischka is entitled to raise this issue on appeal.

In some cases, counsel must make a motion to sever charges at the close of the State's evidence in order to preserve the issue for appeal. CrR 4.4(a) provides:

> (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.
>
> (2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

The purpose of requiring counsel to object before or at the close of all the evidence is that the actual prejudice caused by joinder may not surface until the evidence is presented at trial. Harris, 36 Wn. App. at 749. If counsel fails to make a timely renewal of a motion to sever, the issue is waived and cannot be raised on appeal. State v. Price, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005), aff'd, 158 Wn.2d 630, 146 P.3d 1183 (2006).

Counsel's failure to make a timely motion to sever may amount to ineffective assistance of counsel entitling the defendant to relief. To

prevail on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d (1984).

If there is no reasonable legitimate strategic or tactical reason for counsel's failure to make a timely motion for severance, counsel's performance is deficient. Sutherby, 165 Wn.2d at 884. Failure to move for severance is not reasonable if evidence of one charge would not have been admissible at trial on the other charge. Id. The prejudice prong is satisfied if the motion would properly have been granted if made, and the outcome at a separate trial would probably have been different. Id. at 887; Price, 127 Wn. App. at 203.

As shown above, evidence of each charge would not have been admissible at separate trials on the other charges and therefore counsel had no reasonable tactical reason not to make a timely motion to sever. In addition, the outcome of separate trials would probably have been different and therefore Mr. Lischka is entitled to relief.

3. The error in consolidating the charges requires reversal of the malicious mischief conviction.

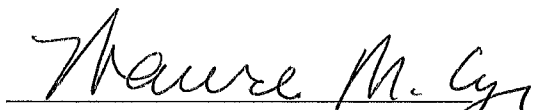
It is well-established that a jury is likely to be influenced in its determination of guilt by the erroneous admission of evidence of a defendant's drug use. "In view of society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of the average juror." Renneberg, 83 Wn.2d at 737; see also LeFever, 102 Wn.2d at 785 (reversing convictions for robbery where court erroneously admitted evidence of defendant's heroin addiction, as "[t]he resultant prejudice to one accused of a crime completely overwhelms any possible relevance or probativeness.").

Here, the jury was likely influenced in its determination of guilt in the malicious mischief case by evidence of the other two cases. Therefore, reversal of the malicious mischief conviction is required.

E. CONCLUSION

Mr. Lischka was unfairly prejudiced by the court's decision to consolidate all three charges in a single trial. The malicious mischief conviction should be reversed and remanded for a new trial where evidence of the other two charges is not admitted.

Respectfully submitted this 13th day of May, 2013.



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APPENDIX

ORIGINAL

Received & Filed
LEWIS COUNTY, WASH
Superior Court

JUL 31 2012

By Kathy A. Brack, Clerk
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JONATHAN A. LISCHKA,

Defendant.

41

Nos. 12-1-00137-0
~~12-1-00173-6~~ 57

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING PLAINTIFF'S MOTION FOR JOINDER

THIS MATTER having come before the Honorable James Lawler of the above-entitled Court for a hearing on May 10, 2012 on the issue of Plaintiff's Motion for Joinder; the Defendant being present and represented by his attorney of record Christine Newbry; the State being represented by Deputy Prosecuting Attorney Shane O'Rourke; the Court having: heard argument from both parties, reviewed the briefing submitted by the parties, and reviewed both court files including both probable cause affidavits, now makes the following findings of fact and conclusions of law regarding Plaintiff's Motion for Joinder of the above captioned offenses:

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FINDINGS OF FACT

1. All of the Defendant's alleged actions in the above captioned cause numbers were the result of one continuing course of conduct related to the Defendant's frustration and disagreement over his relationship, or lack thereof, with his ex-girlfriend Sara Henke.

2. The allegations in this case indicate that the Defendant was behaving unstably and erratically when he contacted Rodney Teitzel and allegedly committed the crime of Harassment. Mr. Teitzel believed the Defendant was using methamphetamine leading up to the alleged harassment, and when the Defendant was contacted he allegedly had methamphetamine in his possession. The conflict with Mr. Teitzel occurred because the Defendant felt that Mr. Teitzel was not on his side when it came to the situation with Ms. Henke. Approximately two weeks after the alleged Harassment, the Defendant had contact with Ms. Henke and allegedly smashed and broke the windshield to her car due to frustration over their relationship.

3. The alleged facts in these cases are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

CONCLUSIONS OF LAW

1. Joinder of the above captioned cause numbers is appropriate under CrR 4.3.

2. The above captioned cause numbers should be consolidated for trial under CrR 4.3.1.

ORDER

1. The Court previously entered an Order on May 10, 2012 granting the Plaintiff's Motion for Joinder. That Order remains in full force and effect, and accordingly, the above captioned cause numbers are consolidated for one trial.

DATED this 31st day of July, 2012

James E. Lawler
SUPERIOR COURT JUDGE JAMES LAWLER

Presented by:

SHANE M. O'ROURKE, WSBA 39927
Deputy Prosecuting Attorney

Approved as to form:

CHRISTINE NEWBRY, WSBA 37604
Attorney for Defendant

Defendant

LEWIS COUNTY
PROSECUTING ATTORNEY
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Chehalis, WA 98532
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. JONATHAN LISCHKA, Appellant.	)))))))))	NO. 43967-1-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF MAY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] JONATHAN LISCHKA 803246 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF MAY, 2013.

X_____

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